



**Beatrice Lukalo v Teacher Service Commission (Petition
101 of 2019) [2020] KEELRC 925 (KLR) (28 May 2020) (Judgment)**

Beatrice Lukalo v Teacher Service Commission [2020] eKLR

Neutral citation: [2020] KEELRC 925 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

PETITION 101 OF 2019

HS WASILWA, J

MAY 28, 2020

BETWEEN

BEATRICE LUKALO PETITIONER

AND

TEACHER SERVICE COMMISSION RESPONDENT

JUDGMENT

1. This Petition was filed on 18/6/2019 due to the Respondent's alleged discrimination of the Petitioner at interviews for promotion to job group R and appointment to the position of County Regional Coordinator and Senior Deputy County Director. The Petitioner therefore seeks the following reliefs:-
 - a. A declaration be and is hereby issued that the Respondent's actions and omissions are a violation of the Petitioner's rights under articles 27, 28, 29, 35 and 54 of the Constitution.
 - b. Damages for violation of the Petitioner's rights under paragraph (a) above.
 - c. Costs of the petition.
2. The Respondent has opposed the petition vide the Replying Affidavit of Josephine Mueni Maundu filed on 4/11/2019.

The Petitioner's Case

3. The Petitioner is a person living with physical disability and is registered with the National Council for Persons with Disabilities. She avers that she has served as the Respondent's County Director of Education from 2012 and that the Respondent has discriminated against her by failing to promote her beyond job group P.



4. The Petitioner avers that on 22/11/2011 the Respondent invited her to an interview scheduled for the next day at Kisumu, without taking into consideration her special needs yet her leg had just been operated on. She passed the interview but has never been considered for a promotion.
5. It is averred that on 25/4/2018, the Petitioner was invited for an interview for the position of County Regional Coordinator, which was scheduled for 3/5/2018. However, she was dismissed at the preliminary stages despite having the relevant qualifications. It is her position that a certificate in Strategic Leadership and Policy was not a requirement under the Respondent's policy, as such, they failed to take affirmative action in her favour.
6. The Petitioner avers that she was denied all training opportunities which has been used to deny her promotion. She further avers that the Respondent failed to provide her with barrier-free and disability friendly work environment to enable her access her work station. It is her case that she has fallen over the stairs several times and injured herself severally. It is her position that the Respondent's actions have violated her rights under articles 27 (6), 28, 29, 35, 41 and 54 of the Constitution.

The Respondent's Case

7. The Respondent contends that the petition is incompetent as it lacks a supporting affidavit to explain the gist and the relevance of the documents attached thereto and that the verifying affidavit attached to the petition cannot be used to support legal arguments in the body of the petition.
8. The Affiant denies the allegation that the Respondent has violated the Petitioner's constitutional rights. She contends that the Petitioner has not identified positions that were vacant and which she was qualified to take up but was denied, or the persons who were promoted to job group N. As such, the Petitioner's allegations are mere speculative apprehensions.
9. The Affiant contends that the Petitioner was promoted over the years. It is averred that on 19/6/2003, the Petitioner sought to be considered for scholarship to study abroad. She was requested to submit a specific application stating the institution she wished to attend and attach an admission letter to aid the Respondent in soliciting for funds, but never did.
10. It is contended that the Petitioner was granted special leave to pursue trainings in Senegal, Tanzania and Nairobi on different occasions and her subsistence allowance was catered for in certain instances.
11. It is averred that on 1/9/2008, the Petitioner applied for a promotion to job group P and was advised to make her application once positions were advertised. However, no jobs were advertised between 2008 and 2011. This led the Petitioner to complain of stagnation.
12. In 2011, several posts for Assistant Deputy Director were created. The Petitioner applied, was interviewed and was promoted to Assistant Deputy Director and thereafter promoted to a County Director.
13. As regards the posts of Senior Deputy Director County and County Regional coordinator, the Petitioner was not considered for the positions as it would have moved her from job group P to R. Those who were considered for those positions were in job group Q.
14. As regards the position of Deputy Director, the Petitioner together with other candidates were disqualified at the interview for failing to produce a certificate in Strategic Leadership Development Program from Kenya School of Governance yet it was a requirement for that position. She avers that the Petitioner has not demonstrated that an Executive Masters of Education Degree in Leadership and Policy Study is the equivalent of a certificate in Strategic Leadership and Development Program and that it is recognized by the public service for purposes of promotions.



15. The Respondent contends that affirmative action does not mean a compromise of regulations and standards for the benefit of disabled persons. Each case has to be considered on its own merits and in the interests of the abled persons competing against the Disabled persons.
16. She further contends that the Petitioner is not the only individual who has stayed in Job Group P since 2011, as there were other physically challenged persons who had held the same position for a length of time. It is averred that promotion depends on availability of vacancies.
17. The affiant avers that the Respondent cannot respond to the allegation of violating the Petitioner's rights under articles 28 and 29, in the absence of an affidavit deposing the manner in which they were violated. She further avers that some information was withheld from the Petitioner because it related to other employees hence the Respondent was at risk of violating their right to privacy. It is her position that the Petitioner has not established a case for discrimination and violation of her right to fair labour practice.
18. The Affiant denies the allegation that the Petitioner's accident which caused her disability, occurred at the Respondent's premises and contends that the Petitioner had at some point indicated that her disability had been caused by polio while on another instance she indicated that she had been knocked down by a tuk tuk.
19. The Affiant avers that the Petitioner had indicated in her letter for review of transfer, that she had been injured while reporting to Elgeyo Marakwet County Office. However, the medical report that was issued to the Respondent indicated that she had been injured on 2/7/2016 which was before she was transferred. As such, it is the Respondent's position that the inconsistencies cast doubt on whether she fell at the Respondent's premises.
20. The Affiant contends that the needs of persons with disabilities are usually taken into consideration while looking for office space, as required by the Persons with Disability Act. She urged that the Petition be dismissed.

The Petitioner's Rejoinder

21. The Petitioner filed her rejoinder in response to the Respondent's Replying Affidavit, vide her Supplementary Affidavit sworn on 19/2/2020. She contends that the advertisement for the positions of Senior Deputy Director County and County Regional Coordinator did not have a requirement that one must be at Job Group Q₁ to be appointed.
22. She also avers that she outscored 6 of the persons who had been appointed for the position of Senior Deputy Director County. It is also her averment that she was not appointed a Regional Director yet she had passed the interviews. It is her position that the Respondent did not take affirmative action, in light of her disability status.
23. The Petitioner further contends that the advertisement for Deputy Director required a Bachelor's and Master's degree certificate only and not a certificate in Leadership and Strategic Leadership. She avers that the Respondent concealed the last part of the advertisement in an effort to mislead this Court.

The Respondent's Rejoinder

24. The Respondent filed a rejoinder in response to the Petitioner's Supplementary Affidavit, vide the Further Affidavit of Salome Mwititi sworn on 13/3/2020.
25. The Affiant contends that the recruitment agency tasked with finding the suitable candidates focused on academic qualification, experience and compliance with the Human Resource Policies and



Procedures Manual. As such, for the Petitioner to be promoted from within, the promotion ought to have complied with the Manual. Therefore, she could not be promoted from job group P to R as that meant that she would bypass persons who were in job group Q.

26. As regards the position of Deputy Director, the Affiant avers that the scheme of service for secretariat staff required one to have attended a senior management post for them to be appointed. She contends that the requirement that a candidate must possess leadership and interpersonal skills, is consistent with the expectation that the candidate has attended the leadership course at the School of Governance.
27. The Petition was disposed of by way of written submissions where the Petitioner filed her written submissions on 20/2/2020 and the Respondent filed theirs on 19/3/2020.

The Petitioner's Submissions

28. The Petitioner submits that the Respondent violated her rights under article 27 (4) and (6) of the Constitution by denying her promotions because she was not a member of job group Q yet she had outscored some of the candidates who were promoted, instead of taking affirmative action in her favour. Further, she was disqualified from the interview of Deputy Director (Teacher Management) for lacking a certificate which had never been a requirement.
29. The Petitioner relies on the case of Republic vs. Independent Electoral and Boundaries Commission ex parte Councilor Elliot Lidubwi Kihusa [2012] eKLR where the Court held that affirmative action was justified to lift disadvantaged groups to equal status as the larger communities, so as to eliminate the mischief that article 27 to reduce.
30. The Petitioner further submits that the Respondent violated her rights under articles 54 (1) (a) (c), that required her to be treated with dignity and respect and to have reasonable access to all places, public transport and information, a factor which caused her to fall down the stairs on several occasions and injure herself.
31. On the appropriate reliefs in this cause, the Petitioner submits that such a relief is one that ensures that the discrimination and violation of the Petitioner's rights and persons with disabilities is remedied through an appropriate order for damages.

The Respondent's Submissions

32. The Respondent submits that the Petitioner was not discriminated against as employees were only promoted when there was a vacancy. Nevertheless, they submit that she had been promoted on several occasions and no evidence was adduced to prove that her colleagues had been promoted while she stagnated.
33. The Respondent further submits that the Petitioner was not appointed to the positions she applied for because there were candidates who were had served longer that she had. They contend that preference of another candidate does not amount to discrimination unless evidence is adduced that such preference was due to her disability. It is their position that other candidates who had performed better than the Petitioner but were in job group P, were not promoted; and that there were other employees who had stayed in the same position for a while.
34. The Respondent submits that the Petitioner has failed to demonstrate that she had previously been a victim of the Respondent's discriminative actions, for her to be considered for affirmative action. It is their position that in the absence on affirmative action guidelines, the Respondent is at liberty to set its qualification standards for its candidates.



35. They rely on the case of John Harun Mwau vs. Independent Electoral Boundaries Commission & Another [2013] eKLR where the Court observed that a person alleging violation of Article 27 must establish that because of a distinction made between them and others, they were denied equal protection or benefit of the law. They also rely on the case of Federation of Women Lawyers (FIDA) & 4 Others vs. Attorney General & 7 Others [2011] eKLR where the Court held that affirmative action did not mean securing positions for special groups of people within the society as they had to first qualify for such appointment.
36. The Respondent submits that no evidence or arguments have been adduced to prove a breach of the Petitioner's rights under Articles 28, 29 and 41 of the Constitution. As regards the right to access to information, it is submitted that this Court lacks the jurisdiction to grant reliefs anchored on breach of rights under Article 35 and relies on the Supreme Court case of Sammy Ndungu Waity vs. IEBC & 3 Others [2019] eKLR, to buttress this assertion.
37. As regards the violation of the Petitioner's rights under Article 54, it is the Respondent's submissions that the Petitioner has failed to prove that the buildings she got injured in were owned by the Respondent so as to make them liable under Section 22 of the Persons with Disabilities Act and that the accidents were occasioned by the Respondent's negligence as the proprietor. It is their position that the Petitioner has given contradictory evidence as how and where her injuries were occasioned.
38. The Respondent submits that the allegations of breach have not been supported by evidence since there is no nexus between the allegations and the constitutional provisions which were allegedly breached. This is contrary to the requirements stipulated in Anarita Kirimi Njeru vs. Republic [1979] eKLR, Mumo Matemu vs. Trusted Society of Human Rights Alliance & 6 Others [2013] eKLR and Dr. Timothy Njoya vs. Attorney General & KRA [2014] eKLR where the respective Courts were of the view that the case ought to outline with a degree of precision, the breached constitutional provisions and the manner in which they have been infringed.
39. I have examined all the averments and submissions filed herein. In determining this Petition, this Court will consider:-
 1. Whether the Petitioner has been denied promotion due to her disability.
 2. Whether the Petitioner has been discriminated against.
 3. Whether the Petitioner's rights have been infringed upon.
 4. Whether the Petitioner is entitled to the remedies sought.

Promotion and discrimination

40. The Petitioner has contended that she was denied promotion from JG P to R.
41. The Petitioner averred that she was invited for an interview as County Regional Coordinator vide the letter of 25/4/2018 to attend the interview on 3/5/2018 at 12.30 pm but was denied the appointment due to her disability despite passing the interview.
42. As per the letter that invited the Petitioner for the interview, the documents she was to carry were:-
 1. Original ID Card
 2. Original Academic and professional certificates and relevant testimonials.
 3. Appointment letter to the current grade.



4. Copy of current payslip.
5. 23 documents:-
 - a) Clearance from HELB
 - b) Certificate of Good Conduct from the CID
 - c) Tax Compliance Certificate from the KRA
 - d) Clearance from the Ethics and Anti-Corruption Commission and Conduct Reference Certificate for the CRB.
43. The Petitioner had received the invite to these interview positions after applying for the same. Prior to this, the Petitioner had been Teachers Service Commission County Director, a position she was appointed to on 16/4/2012. She therefore contends that she had stalled in her promotions since then.
44. The job advert that triggered off the appointment indicated that the applications was to be done through the Teachers Service Commission portal. The job advert also indicated the remuneration package and duties of the holder of the position of Deputy Director.
45. The Respondent attached the interview scores as their exhibit. The sheet show that the Petitioner was not interviewed because she lacked the Senior Leadership Development Programmer (SLDP) certificate.
46. The Petitioner avers that the lacking of Strategic Leadership Development Program (SLDP) certificate would not have barred her from being interviewed because she has a Masters Degree in Leadership.
47. Neither the Petitioner nor Respondent pointed out whether the advert for this appointment indeed required the existence of the Strategic Leadership Development Program (SLDP) Certificate from the Respondents Exhibit JMM 26 at page 29 of their documents. The documents needed for the application were certificate of good conduct, HELB certificate, clearance certificate from EACC, certificate for CRB and KRA Tax certificate.
48. On whether a Strategic Leadership Development Program (SLDP) certificate was also part of the qualifications or not can be deduced from the fact that the Petitioner was shortlisted for the post and even invited for the interview. This is an indication that she had the relevant qualifications for the post.
49. It was therefore in bad light for her not to be interviewed because she lacked a Strategic Leadership Development Program (SLDP) certificate.
50. The Petitioner insists that she was denied the promotion due to her disability. The Respondent have demonstrated that this is not true because there were other Applicants who were also not appointed though invited for interview and they had no disabilities like the Petitioner. The assertion by the Petitioner therefore that she was discriminated against due to her disability is not established and is rejected. This position also answers to the issue of discrimination.
51. The Petitioner has not demonstrated that the persons promoted were promoted only on account of lacking any disability and lacked all the other qualifications attached to the post.
52. The issue of discrimination is also not proved and is therefore rejected.



Rights

53. The Petitioner has also submitted that her rights under the Constitution were infringed upon. She avers that she was subjected to poor working conditions which led her to fall from the stair case many times injuring her. She also averred that she requested for training and this was denied.
54. She has also averred that she was denied all training opportunities which would have been used to deny her promotion.
55. On the issue of her falling down from the stair case, the Petitioner ought to demonstrate that this actually happened and led to inquiry on her part. No medical documents have been produced to demonstrate such.
56. The Petitioner also failed to show that she applied for particular training that would have led to her promotion and was also denied. Infact the Respondent produced evidence to show that she was even allowed to go for various trainings in Senegal, Tanzania and Kenya.
57. The Petitioner failed to show which particular training would have been key to her promotion for which she applied for and was denied attendance or facilitation.
58. The Petitioner has therefore failed to show that her rights as pleaded under Articles 27(6), 28, 29, 35, 41 and 54 of the Constitution were infringed upon warranting any compensation.

Remedies

59. I find that the Petitioner has not proved her case as required and therefore I find the Petition without merit. I dismiss this Petition accordingly with no order as to costs.

DATED AND DELIVERED IN CHAMBERS VIA ZOOM THIS 28TH DAY OF MAY, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Ochiel for Petitioner – Present

Respondent – Absent

